

## HUMAN SERVICES BOARD

# INTRODUCTION

## DISCUSSION

(B) Failure to supply the child with adequate food, clothing, shelter, or health care. . .

(C) Abandonment of the child.

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

33 V.S.A. § 4912

The child in this matter was the subject of a CHINS petition filed in his behalf by the state in August 2007. On October 18, 2007 the Family Court issued **Findings and Order** that the petitioner had admitted previous allegations that included separate counts that in August 2007 her child was "without proper parental care or subsistence, education, medical, or other care necessary for his well-being", and that he had been "abandoned or abused by his parent".

In August 2008 the Department sent the petitioner a notice that it had upheld its decision to substantiate the August 2007 report that the petitioner had placed her child at risk of harm and to place the petitioner's name in its abuse and neglect registry.

There is no claim or indication in the record that the petitioner ever appealed, or sought any other legal proceedings, to contest any of the findings of the Family Court following its **Findings and Order** of October 18, 2007.

In opposing the Department's Motion for Summary Judgment the petitioner does not specifically argue that the findings made by the Vermont Family Court fall outside of the definition of "risk of harm" as that term is used in the above statute. Even if she did, there is no question that the facts found by the Court clearly describe acts that placed the child at risk of harm, as defined in the statute.<sup>1</sup>

The petitioner's opposition to summary judgment is based on her representation that she admitted to the allegations in the CHINS proceeding in order to "place (her son) in State custody so that he can obtain the services he needs". She maintains that because she is a licensed LNA, the charges have kept her from working.

The Board has repeatedly and consistently adopted the doctrine of collateral estoppel in prior proceedings of this nature and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990), to determine

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<sup>1</sup> The definition of a child in need of care and supervision (CHINS) is one "without proper parental care or subsistence, education, medical, or other care necessary for his well-being". 33 V.S.A. § 5502(a)(12)(B). In this case there is no dispute that the Family Court held, and the petitioner admitted, that her child met this definition. The petitioner does not argue, and it is difficult to imagine, that there can be circumstances in which a child who is adjudged to be CHINS (i.e., being denied "necessary parental care" would *not* meet the definition of "risk of harm" under the above abuse and neglect statutes. See Fair Hearing No. H-04/08-139.

whether it is precluded by the findings in a Family Court proceeding from making its own findings in the context of an expungement hearing. The Board's policy in this regard was recently upheld by the Vermont Supreme Court in *In re P.J.*, 2009 VT 5 (August Term, 2008). See Fair Hearing No. 20,854. The *Trepanier* criteria approved by the Court in these matters are as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

*Id* at 265.

The facts of this case are indistinguishable from *In re P.J.* In that case, the petitioner had also stipulated to the facts in her CHINS proceeding, but argued to the Board (and the Supreme Court) that she had "no incentive" to litigate those facts. The key issue, the Court concluded, was whether she had the "opportunity" to do so.

In this matter, the petitioner was a party in the earlier Family Court proceedings, which resulted in a final

decision on the merits. The issue, whether sufficient facts were found that constitute the petitioner having placed her child at risk of harm, was clearly resolved by the Family Court, which specifically found that the petitioner abandoned her son and failed to provide him with basic and necessary parental care and supervision. Although she now claims she had a compelling reason to have done so, it is clear, as it was in *In re P.J.*, that her decision to admit these facts in Family Court was tactical, and does not negate the fact that she had a full and fair *opportunity* to have contested them at that time. Thus, there is nothing "unfair" about denying her the opportunity to take the opposite position in this matter and relitigate those same facts.

ORDER

Inasmuch as the Trepanier test (*supra*) is clearly met in regard to the facts and circumstances considered by the Family Court, the Department's request for summary judgment in its favor is granted.

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